BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, here requested to be reviewed, is reported in 134 F. 2d 228 and is printed in the Transcript of Record, page 73. The injunctive decree and order (confirming the decree) of the District Court of the United States, Northern District of Illinois, Eastern Division, is printed in the Transcript of Record, pages 36 and 58, respectively.

Jurisdiction.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 15, 1943 (R. 73). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, paragraph 347 (a)).

Statement of the Case.

The essential facts of the case are fully stated in the accompanying Petition for Writ of Certiorari under the title of "Summary and Short Statement of the Matter Involved" and will not be repeated here.

The Law.

The pertinent and applicable sections of Part II of the Interstate Commerce Act are referred to and briefly explained in the accompanying Petition for Writ of Certiorari

under the heading of "Statement Concerning Petitioner and Pertinent Provisions of the Act" and will not be further referred to or dealt with here.

Specifications of Errors.

Petitioner makes the following assignment of errors:

1. The United States Circuit Court of Appeals for the Seventh Circuit in affirming the injunctive decree entered by the District Court of the United States, Northern District of Illinois, Eastern Division, erred in not modifying said injunctive decree to cover only instances of transportation and have effect in only the territory wherein such instances of transportation occurred, and limiting the application and effect of said decree to only such instances of transportation and the territory in which they occurred in accordance with the evidence of record.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in not holding that the complaint was improperly amended after trial of the case and an announcement of the decision by the District Court of the United States, because such amendment was broader than and did not conform to evidence of record.

SUMMARY OF ARGUMENT.

1. To subject the petitioner to the constant threat of contempt proceedings should it at any time in any part of the broad territory, other than that limited part to which the evidence is confined, inadvertently move a shipment between two points in one state through another state and assess a rate or charge that deviates in some slight manner from the proper rate or charge, is a gross deprivation of its right to due process of law and would improperly subject the petitioner to the obloquy and pains and penalties of the restraining order.

2. The issues upon which the case was tried had to do with shipments handled by petitioner between East St. Louis, Illinois and other points in Illinois through St. Louis, Missouri under facts and circumstances that obtained in the handling of such shipments and clearly did not have to do with shipments handled between points in other portions of the broad territory. There was no basis to suggest and grant leave to amend the complaint, especially for the purpose of supporting a broad territorial application of an injunction beyond that territory covered by the evidence.

ARGUMENT.

1. The injunctive decree should have been modified to cover only instances of transportation and have effect in only territory wherein such instances of transportation occurred and its application and effect should have been limited to only such instances of transportation and the territory in which they occurred in accordance with the evidence.

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, the Court had enjoined the Chesapeake & Ohio railroad from violating prohibitions of the Interstate Commerce Act against undue preferences and discriminations. The Chesapeake & Ohio was selling coal to the New Haven road at prices which did not permit the Chesapeake & Ohio its published rates of transportation. The trial court held there were no violations of the provisions of the second and sixth sections of the Act to Regulate Commerce but that the contracts amounted to an undue discrimination and violation of the third section of the Act (49 U. S. C. 2, 3, 6). The trial court denied a request made by the Commission that the injunction be expanded so as in general terms to command the Chesapeake & Ohio perpetually to observe in the future its published rates. The Supreme Court modified the injunction and enlarged it by enjoining the Chesapeake & Ohio from taking less than the freight rates fixed in its published tariff by means of dealing in the purchase and sale of coal. As to the cross-appeal of the Commission contending that the Court should have enjoined the Chesapeake & Ohio from transporting coal from one state to or through any other state for the

New Haven or for any person at a less rate than the duly established freight rate in force at the time, and from further failing to observe its published tariffs or from giving to any person any undue or unreasonable preference or advantage, Mr. Justice White, speaking for the unanimous court, said (page 404):

> "The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

In *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426, 85 L. Ed. 930, the Court cited with approval the *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 50 L. Ed. 515, and held (pages 435-436):

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. Ed. 518, 25 S. Ct. 276; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404, 50 L. Ed. 515, 526, 26 S. Ct. 272, and see under the *National Labor Relations Act, National Labor Relations Bd.* v. *Swift & Co.,* (C. C. A. 7th), 108 F. (2d) 988.
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> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See *e. g.,*

H. J. Heinz Co. v. *National Labor Relations Bd. No. 73*, decided January 6, 1941 (311 U. S. 514, *ante*, 309, 61 S. Ct. 320)."

As the petitioner has stated on page 6 of its Petition for Writ of Certiorari, its activities complained of in some segregated part of a broad territory have not been shown to be similar to activities of the petitioner in other parts of the territory and the territorial scope of the application of the decree is encompassed with the question of broadness, particularly where the effect of the decree goes beyond the territory wherein the evidence or actual activities complained of are confined.

The petitioner, on the same page of its Petition, pointed out the *Commonwealth Edison Company* case recently decided by the United States Circuit Court of Appeals for the Seventh Circuit, wherein the principles laid down in the *Express Publishing Company* case, which are in conflict with its decision in the instant case, were again upheld.

In *National Labor Relations Board* v. *Swift & Co.*, 108 F. (2d) 988, the Circuit Court of Appeals for the Seventh Circuit struck from an order of the Labor Relations Board a provision which required the defendant to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the right guaranteed them under Section 7 of the Act (29 U. S. C. 157). As to that, the Court said (page 990):

> "*Paragraph 1(b) of the order:* The Board was not warranted, however, in enjoining respondent from committing any act which might constitute a violation of Sec. 7 of the Act. In truth, the conduct enjoined has no fair relation to the issue which was heard and determined by the Board. The action of the Board in this respect was neither necessary nor proper under the facts and circumstances. The order is too broad."

Another portion of the order of the Board was found to be proper. In dealing with varying conditions the Court said (page 990):

> "As the remedy varies from case to case, so an order too broad in one case may be too narrow in another. In the last analysis of things, the propriety of an order depends on the facts of the case itself, and consideration is to be given to the complaint, the findings, and the character of the unlawful conduct—in short, consideration is to be given to all the facts and circumstances."

The facts on which the Board issued its order, which included the paragraph found by the court to be proper, deals with facts and circumstances set forth in *Swift & Co.* v. *National Labor Relations Board*, 106 Fed. (2d) 87. By referring to the statement of the case therein, it can be seen that the facts and circumstances pertain to a master and servant relationship having to do with a packing plant of the master situated at Denver, Colorado, and alleged unfair labor practices carried on by certain managers and supervisors in charge of that particular plant who used coercive methods to compel the employees to join a company dominated union. The master had been ordered to cease and desist from interfering with the company dominated union. The managers and supervisors apparently continued in their attempt to exercise control over and to influence the employees of the particular plant and interfere with the affairs of this particular local union and a petition for an enforcement of its order was filed against Swift & Co. by the National Labor Relations Board. Under such facts and circumstances, it can readily be seen how a court on being petitioned for injunctive relief would hold such portion of an order of the Board as being proper where the master was ordered to cease and desist from controlling and influencing the employees of a particular plant at a particular place through a particular labor organization (employer controlled) or "any

other labor organization." It is noteworthy that the court did not permit that portion of the order of the Board to stand which would have applied, through injunctive relief, to master and servant relationships at other plants in other states, or for that matter any plant in the one state other than the one involved. In view of the facts and circumstances, all as summarized above, it appears that the decision in the *Swift & Co.* case supports the petitioner's position in the instant case.

In *Southern Pac. Co.* v. *Colorado Fuel & Iron Co., et al.*, 101 Fed. 779, the Circuit Court of Appeals, Eighth Circuit, reversed a decree which provided, in part, that the defendants be enjoined from further continuing to violate and disobey the Interstate Commerce Act. In discussing this phase of the injunctive order, the Court states at page 785:

> "Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, * * *."

To subject the petitioner in the instant case to the constant threat of immediate contempt proceedings should it at any time inadvertently move a shipment between two points in any state through an adjoining state at an improper rate is a gross deprivation of its right to due process of law.

The burden of producing evidence in support of alleged violations of the Interstate Commerce Act is upon the Commission, and, where no such evidence is produced as to points in any states other than Illinois, there is no basis for an injunctive order as broad as that entered by the

District Court and affirmed by the Circuit Court of Appeals, and certainly it is not the duty of the petitioner to produce negative evidence of freedom from such violations in order to liberate itself from an all-inclusive restraining order.

2. The Complaint was improperly amended after trial of the case and an announcement of the decision by the trial court, because such amendment was broader than and did not conform to the evidence of record.

It is ordinarily within the sound discretion of the Court at any time to permit an amendment *to conform to the proof* where evidence has been introduced. We do not have such a situation here because there is not a scintilla of evidence in the record, nor was any proposed to be offered, that would support the broad amendment or the broad application of the judgment as indicated by the trial court before the Amended Complaint was filed by the Commission.

In *Simms* v. *Andrews,* 118 F. (2d) 803, where error was assigned on a ruling vacating an order setting aside a judgment in order to permit amendment of a reply to an intervening petition to make it *conform to the proof adduced at the trial,* the Circuit Court of Appeals for the Tenth Circuit, in reference to Rule 15 (b) (Rules of Civil Procedure for the District Courts of the United States, 28 U. S. C. foll. 723c) stated (page 807):

> "It is ordinarily within the sound discretion of the trial court to permit an amendment to conform to the proof *where evidence has been introduced without objection* as to facts not presented, or insufficiently presented, by the pleadings. The right to amend pleadings to conform to the proof proceeds upon the theory that by such amendment the pleadings are brought in line with the actual issues upon which the case was tried, even though such issues were not stated in the pleadings as originally drawn. In such case it is the

duty of the court, *after the evidence upon the supposed issue has been introduced* without objection, to permit the amendment." (Italics ours.)

In the case here at bar, there was no evidence before the trial court to support the broad amendment when leave was granted to file the Amended Complaint nor was any received or even offered at any time after the Amended Complaint was filed. It is obvious that there was no basis to suggest and grant leave to amend the complaint, especially for the purpose of supporting a broad territorial application of an injunction beyond only that territory which was encompassed by the evidence. In order to say that there was evidentiary basis for the amendment or the broad territorial application of an injunction beyond only the territory wherein all of the instances of transportation occurred that were in any way dealt with in the evidence, it would be necessary to assume that the facts and circumstances pertaining to shipments that the petitioner may handle between points in other states through another state resemble and are similar to the facts and circumstances under which the petitioner handles shipments between East St. Louis, Illinois, and other points in Illinois through St. Louis, Missouri, notwithstanding that the record reveals nothing concerning the handling of shipments in the other portions of the broad territory.

Conclusion.

It is respectfully urged that, in the light of the above authorities and the evidence of record in this proceeding, it was error for the United States Circuit Court of Appeals for the Seventh Circuit to affirm the broad application of the injunctive decree entered by the District Court of the United States, Northern District of Illinois, Eastern Division. The United States Circuit Court of Appeals for the Seventh Circuit erred in not modifying the injunctive

decree to cover only instances of transportation and have effect in only the territory wherein such instances of transportation occurred, and should have limited the application and effect of the decree to only such instances of transportation and the territory in which they occurred in accordance with the evidence of record. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Affidavit of Service.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

FLOYD F. SHIELDS, being duly sworn, on oath deposes and says that he is one of the attorneys of record for Keeshin Motor Express Co., Inc., Petitioner, and that he served a copy of the above Petition for Writ of Certiorari and Brief in Support Thereof upon Colin A. Smith, one of the attorneys of record for the Interstate Commerce Commission, Respondent, by personally delivering said copy into his hands at his office in Chicago, Illinois, on June 12, 1943.

FLOYD F. SHIELDS.

Subscribed and sworn to before me this 12th day of June, 1943.

KEITH C. BARTLETT,
(SEAL) *Notary Public.*

My commission expires December 22, 1945.